

SERVICE DATE – SEPTEMBER 11, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION—CONTROL—EJ&E WEST COMPANY

Decision No. 15

Decided: September 10, 2008

In Decision No. 2, served November 26, 2007, the Board accepted for consideration the application filed by Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC) on October 30, 2007 (October 30 application), for Board authorization of the proposed acquisition of control of EJ&E West Company (EJ&EW), a wholly owned noncarrier subsidiary of Elgin, Joliet & Eastern Railway Company (EJ&E), by CNR and GTC (collectively referred to as CN or applicants). This proposal is referred to as the transaction.

BACKGROUND

In its October 30 application, CN stated that, as part of the proposed transaction, it expects to cease operations over an 11-mile segment of railroad track known as the St. Charles Air Line route (Air Line route) in Chicago, IL, by the end of the 3-year implementation period of the transaction. Several parties, including the National Railroad Passenger Corporation (Amtrak), filed comments, expressing opposition to the proposed transaction and asserting that the abandonment of the Air Line route would result in the disruption or discontinuance of Amtrak service to affected locations. In response to these comments, CN states that it has agreed to the conditions sought by Amtrak, namely that Amtrak may remain on the Air Line route, until

¹ This decision also embraces Elgin, Joliet and Eastern Railway Company—Corporate Family Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 1); Chicago, Central & Pacific Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 2); Grand Trunk Western Railroad Incorporated—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 3); Illinois Central Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 4); Wisconsin Central Ltd.—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 5); EJ&E West Company—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company, STB Finance Docket No. 35087 (Sub-No. 6); and EJ&E West Company—Trackage Rights Exemption—Illinois Central Railroad Company, STB Finance Docket No. 35087 (Sub-No. 7).

the Grand Crossing Connection or another acceptable alternative is available, at a cost to be capped at the current level (adjusting only for inflation pursuant to the formula contained in the agreement between CN and Amtrak) and at the level of operating utility currently enjoyed by Amtrak.

On May 8, 2008, the Illinois Department of Transportation (IDOT) filed a motion to compel discovery from CN, seeking information regarding the cost of maintaining tracks, equipment, bridges, viaducts, and grade crossings along the Air Line route.² IDOT asserts, among other things, that obtaining information detailing the cost of maintaining the tracks and structures is critical to the public interest because the cost of maintaining the Air Line route will be borne by IDOT and Amtrak, ultimately at the public expense, under the terms of the proposed transaction. IDOT notes that, while CN has informed IDOT of CN's ongoing negotiations with Amtrak, no binding agreement regarding maintenance of the Air Line route has been reached, nor has CN provided IDOT with any meaningful assurances to that effect.

In a reply filed July 2, 2008, CN reiterates its commitment to negotiating with Amtrak an agreement that would implement the commitments sought by Amtrak. CN states that its offer to allow Amtrak to maintain existing service at no additional cost resolves any and all issues, including IDOT's concerns, regarding the impacts of the proposed transaction on Amtrak service. CN also notes that it has invited the Board to impose the commitments made to Amtrak as conditions to authorization of the transaction. Further, CN states that the information sought by IDOT is not developed or maintained by CN in the regular course of business. In a letter to IDOT, dated February 7, 2008, CN states that it "does not have and does not regularly develop actual or projected maintenance costs" for the Air Line route and that the current CN/Amtrak agreement, which runs through January 31, 2010, provides for Amtrak to pay a fixed base rate for maintenance, subject to escalation in accordance with indices. CN further states in the February 7 letter that it has agreed to develop this information as part of its confidential negotiations with Amtrak.

DISCUSSION AND CONCLUSIONS

IDOT's motion to compel will be denied. CN submits that the information is not maintained and does not exist. In light of this representation, an order to compel the production of this information would serve no purpose.³ A party can not be required to prepare new documents solely for their production. Also, given CN's representations regarding the Air Line route, namely its commitment, as a condition of the Board's approval of the application, to capping costs at current inflation-adjusted levels for as long as Amtrak remains on the Air Line route, the information sought by IDOT is not likely to be relevant for the purposes of this proceeding. CN has consistently represented its commitment to Amtrak throughout its filings

² Specifically, IDOT submitted five document requests, including "any analysis or projections regarding the annual maintenance and operation activities and costs required or recommended for the CN track after the acquisition is fully implemented." IDOT Request for Production of Documents (filed March 3, 2008).

³ The Board's discovery rules require the existence of documents sought. See 49 CFR 1114.30.

before the Board. In its March 13 reply, CN states that it has agreed to the conditions sought by Amtrak and included a letter to Amtrak, dated March 10, 2008, in which it expresses its commitment to allowing Amtrak to remain on the Air Line route and to capping costs to Amtrak for maintaining the segment at the current level, indexed for inflation in future years, as provided by the current CN/Amtrak agreement. In a March 27, 2008 filing, CN reiterates this commitment in response to a letter of opposition filed by Congresswoman Melissa Bean. The Draft EIS, served July 25, 2008, also includes this commitment as a voluntary mitigation measure submitted by CN. Though no binding agreement has been reached between CN and Amtrak, it appears that, should the transaction be approved, CN is fully intent on allowing Amtrak to remain on the Air Line route, until an alternative route is available, at costs capped at the current level (as adjusted for inflation). CN, in its surrebuttal, filed April 28, 2008, states that it does not object to the Board conditioning approval of the transaction on its commitment to Amtrak. A condition along those lines, if imposed by the Board, could adequately address IDOT's concerns regarding any costs it might incur under the proposed transaction.

To the extent that IDOT has concerns regarding matters that are covered by the environmental review of the proposed transaction, it may submit comments before the Board's Section of Environmental Analysis (SEA).⁴

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. IDOT's motion to compel is denied.
2. This decision is effective on the service date.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary

⁴ See Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, STB Finance Docket No. 35087 (STB served Feb. 22, 2008) (Decision No. 8). In Decision No. 8, the Board denied motions to compel filed by parties seeking discovery on environmental matters. The Board found that formal discovery on environmental issues was not available because such information would be developed by SEA during the environmental review process.